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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

MARK ARDEN SCHMUCKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REX E. LEE
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
ANDREW L. FREY
Deputy Solicitor General
JOHN H. GARVEY
Assistant to the Solicitor General
JOHN F. DE PUE
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether respondent was impermissibly selected for prosecution for violation of the Military Selective Service Act in retaliation for the exercise of his First Amendment rights.

2. Whether respondent was improperly denied the right to an evidentiary hearing on his claim of selective prosecution.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 721 F.2d 1046. The order of the district court denying respondent's motion to dismiss for selective prosecution (App., *infra*, 19a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1983 (App., *infra*, 11a-12a). A petition for rehearing was denied on March 12, 1984 (App., *infra*, 13a). On May 2, 1984 Justice O'Connor extended the time for filing a petition for a writ of certiorari to June 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, respondent was convicted of failing to register with the Selective Service, as required by Presidential Proclamation No. 4771, in violation of 50 U.S.C. App. (& Supp. V) 453, 462. He was sentenced under the Youth Corrections Act to three years' probation, conditioned upon serving the first 24 months of the term in community service at a home for the mentally retarded (C.A. App. 10-13).

1. On July 2, 1980, President Carter, acting pursuant to the Military Selective Service Act (50 U.S.C. App. (Supp. V) 453), issued Presidential Proclamation No. 4771 (45 Fed. Reg. 45247 (1980)). The proclamation directed males residing in the United States and born in 1960 to register with Selective Service during the week of July 21, 1980, by filling out a registration form at a local post office (App., *infra*, 1a-2a). Respondent, a college student born on October 4, 1960, did not do so (Tr. 88, 92, 153, 159, 161-165; C.A. App. 31). Instead, on August 10, 1980, he sent a letter to Selective Service saying that he had "violated the Military Selective Service Act by not registering," explaining that he had refused to do so on the basis of his religious convictions (Tr. 24-25; C.A. App. 24-25).

Selective Service received other communications like respondent's which stated that the writers were required to register but had not done so, or that other persons known to the writer were required to register but had failed to do so (Tr. 21). As a result, Selective Service developed a system for processing the communications and attempting to obtain compliance from the alleged nonregistrants whose names had come to its attention. It opened a file on each person whose alleged failure to register had been reported, and after verifying that the person in question had not registered, sent each a letter reminding him of his obligation, requesting that he comply by filling out an enclosed regis-

tration card, and warning that failure to comply could result in prosecution (Tr. 21-24, 26-30; C.A. App. 28-29). Although respondent received a copy of the letter and registration form, he failed to reply (Tr. 31-34, 242).

On October 21, 1981, respondent's name was transmitted with the names of other nonregistrants to the Department of Justice for possible prosecution. The Department attempted unsuccessfully to obtain his voluntary compliance with the registration requirement through additional correspondence with him (Tr. 35). President Reagan also declared a national grace period between January 7, 1982 and February 28, 1982, during which anyone who was required to register but had not done so could register without fear of prosecution (Tr. 35-36). Again, however, respondent failed to register.

On June 22, 1982, respondent was interviewed by an FBI agent. He admitted that he knew he had an obligation to register and that he had failed to do so. He explained that his refusal was designed to "cause the United States Government to be delayed in mobilizing [its] armed forces" by requiring it to expend time investigating and prosecuting his case (Tr. 165).

Testifying on his own behalf at trial, respondent again acknowledged that he had knowingly failed to register (Tr. 226, 240-241). He explained that the registration requirement conflicted with his religious beliefs as a member of the Mennonite church, because his registration would "facilitat[e] the efficient mobilization of [the] Armed Forces * * * [and] thus allow the country to prepare for war more easily" (Tr. 223-224).

2. a. Respondent moved before trial to dismiss the indictment on the basis of selective prosecution. He argued that, at the least, an evidentiary hearing and further discovery directed to that issue were warranted.[1]

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[1] Respondent did not specify what evidence he desired to develop during an evidentiary hearing, nor did he seek to subpoena any government officials responsible for enforcement of

To support his claim he alleged that, from more than half a million eligible men who had not registered, the government had singled out for prosecution only eight, each of whom either had expressed dissent against draft registration in letters to the government or had publicly denounced the registration law. The motion charged that the selection of these men for prosecution was the result of a policy "intentionally and exclusively based upon information generated through the exercise of First Amendment rights of expression * * * [which] focus[ed] only upon self-identifiers who were exercising the rights to petition the government for redress of grievances as well as protected speech rights" (Mot. to Dismiss for Selective Prosecution No. CR-82-133A (N.D. Ohio Sept. 15, 1982)).

To substantiate this charge respondent relied upon statements made in memoranda generated within the Justice Department's Criminal Division. For example, a Mem. from Lawrence Lippe (Chief of the General Litigation and Legal Advice Section) to Assistant Attorney General D. Lowell Jensen (Mar. 19, 1982) explained that the cases referred to the Division by Selective Service consisted of nonregistrants who had reported themselves or who had been reported by others. The memorandum predicted that "the present scheme is liable to result in numerous selective prosecution claims."

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the registration law. Compare *United States* v. *Wayte*, 710 F.2d 1385, 1387 (9th Cir. 1983), cert. granted, No. 83-1292 (May 29, 1984). Two weeks later, however, respondent filed a "Motion to Compel Discovery" seeking additional materials to support his selective prosecution claim. The motion sought production of the files of all nonregistrants referred by Selective Service for prosecution; the study and report of the Presidential Military Manpower Task Force concerning the registration program; and all communications among government agencies—including Selective Service, the Presidential Military Manpower Task Force, the Department of Justice, the Department of Defense, and the White House Staff—regarding prospective prosecutions for failure to register (Mot. to Compel Discovery, No. CR-82-133A (N.D. Ohio, Sept. 27, 1982)).

Although "there will be enormous numbers of non-registrants who are neither identified nor prosecuted, a prosecution of a vocal non-registrant will undoubtedly result in allegations that the prosecution is brought in retribution for the exercise of the non-registrant's exercise of his first amendment rights" (C.A. App. 42-43; App., *infra*, 4a). The memorandum noted, however, that although the problem of selective prosecution claims could be avoided by waiting until a method for "active" identification of nonregistrants was developed, further delay in initiating prosecutions would adversely affect the registration scheme.

A July 14, 1982 memorandum from Lippe to Jensen stated that, although Selective Service was exploring ways to develop an active enforcement system through the use of Social Security records, and although legislation to permit such a program was pending in Congress, "Selective Service's enforcement program is presently 'passive.' Non-registrants are brought to the Service's attention either when they report themselves or when others report them. Consequently, the first prosecutions are liable to consist of a large sample of (1) persons who object on religious and moral grounds and (2) persons who publicly refuse to register" (C.A. App. 45-46).

The government responded to the motion to dismiss by filing affidavits explaining the development and implementation of the prosecution policy. Edward A. Frankle (the Selective Service attorney responsible for the development of its compliance program) explained that Selective Service had adopted a "passive compliance" program. It simply collected names that came to its attention by letters and telephone calls—some ("slightly less than half") (C.A. App. 48) from nonregistrants themselves, the others from third parties. After confirmation that an individual was required to register and had failed to do so, a file containing pertinent correspondence was established and his name was entered into a "Suspected Violator Inventory Sys-

tem." On October 21, 1981, after Selective Service had written letters attempting to obtain voluntary compliance, it referred the files of 49 nonregistrants (including respondent), to the Department of Justice for possible prosecution (C.A. App. 49-54).[2] Frankle's affidavit stated (*id.* at 54):

> [Respondent's] case was not given any special attention by Selective Service and he was not specially investigated or individually discussed or specially handled by Selective Service System. Outside of his statements made in his letter to Selective Service, Selective Service had at the time of his referral no knowledge whatsoever of any activities of [respondent] and indeed still [is] unaware of any outside activities. Therefore, he was not referred for possible prosecution because of any antidraft or political activities. He was referred simply because his name came to the attention of Selective Service and upon investigation by letter, it became apparent that he most probably was in violation of the Military Selective Service Act.

Frankle went on to say that Selective Service had adopted the passive enforcement program because it was at the time the only means of identifying nonregistrants for which Selective Service had the authority and resources. The agency was trying to implement an "active" program for identifying nonregistrants through the use of Social Security numbers. That program, which had required legislative authorization for the use of Social Security information, was expected to be operating by late 1982 or early 1983 (C.A. App. 55-56).[3]

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[2] This was the second group of referrals. The affidavit explained that other names had been sent earlier under the same system.

[3] On December 1, 1981 Congress enacted legislation authorizing the President to require the Department of Health and Human Services to furnish Social Security data to the Director of Selective Service to assist in the enforcement of the registration

An affidavit executed by David J. Kline (the attorney within the Department of Justice responsible for supervising the administration of the Selective Service Act) stated that between July and October of 1981 he received from Selective Service the files of 183 nonregistrants who had reported themselves or who had been reported by others.[4] After reviewing the files to determine whether those individuals were in fact required to register, Kline referred the names (including respondent's) to the FBI for further investigation, and to the appropriate United States Attorneys for possible prosecution (C.A. App. 62-64). In June 1982, after checking

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law. See 50 U.S.C. App. (Supp. V) 462(e). Six additional months elapsed before the two agencies worked out the necessary implementing details.

Although arrangements were made with the Department of Health and Human Services for use of Social Security data by June 1982, it turned out that current addresses of nonregistrants could be obtained only from the Internal Revenue Service. The IRS declined to divulge that information, believing that disclosure would violate 26 U.S.C. 6103. IRS has, however, sent notices from Selective Service to identified nonregistrants advising them that they should register or face possible prosecution.

Once it became clear that "active" enforcement of the registration law could not depend on the use of Social Security data, Selective Service began negotiations with state departments of motor vehicles for the names and addresses of eligible men in driver's license files. The first referrals of nonregistrants by Selective Service to the Department of Justice arising from that system occurred in February 1983. To date more than 100,000 names have been referred to the Department of Justice under that system. The Department has randomly selected 428 of the persons identified for investigation and prosecution. To date there have been no prosecutions, however, because each time a nonregistrant is given (as respondent was) the choice of registering or being prosecuted, he has chosen to register.

[4] Kline received 134 of the files in July 1981. He received a second group of 49 files, including respondent's, on October 21, 1981 (C.A. App. 62, 64).

to see whether any individuals had registered during the Presidential grace period, Kline asked the concerned United States Attorneys to proceed with prosecutions on a priority basis, since any more delay would only encourage further noncompliance (C.A. App. 66-67). Kline concluded by explaining that when respondent's name was referred to the United States Attorney for the Northern District of Ohio, he "knew no more about [respondent] than was contained in the material referred by the Selective Service System." The referral was made "for no reason other than that it appeared that [respondent] had violated federal law by failing to register with the Selective Service System" (C.A. App. 67-68).

Finally, affidavits executed by the United States Attorney for the Northern District of Ohio and by the Assistant United States Attorneys responsible for respondent's prosecution stated that, after respondent's file was referred to their office, they alone made the decision to seek an indictment on the basis of its "prosecutive merit" rather than "upon any anti-draft registration activities in which [respondent] might have engaged" (C.A. App. 72-79).[5]

b. The district court denied the motion to dismiss. It also held that, because respondent had failed to make out a prima facie case of selective prosecution, no evidentiary hearing on the issue was warranted (App., *infra*, 20a). Rejecting respondent's claim that the government had singled out for prosecution only vocal opponents of draft registration, the court observed that neither respondent nor another previously convicted

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[5] The affidavit of one of the prosecutors stated that, before seeking an indictment, he had contacted respondent and sought to convince him to reconsider his decision, and to apply for conscientious objector status should the draft be reinstituted. Respondent replied that he could not do so, since conscientious objectors "were controlled by the military" (C.A. App. 77-78).

nonregistrant had publicly called attention to his anti-registration views before being indicted. There was therefore no basis for suspicion that the government was pursuing prosecutions in retaliation against those who publicly denounced registration (*id.* at 20a-21a).

The court also found no merit to the claim that it was impermissible to single respondent out for prosecution because he had reported his failure to register in a letter to Selective Service. The fact that the government had prosecuted those who wrote of their intent not to register indicated only a preference for prosecuting strong cases.

The court rejected the claim that the government's use of a passive enforcement system was in itself evidence of a discriminatory intent. It observed that respondent's own exhibits showed "that the government is not invidiously preferring passive detection." Instead, it was trying to establish an active system for prosecuting nonregistrants on a random basis. The government properly believed, however, that until the active program could be implemented, immediate prosecutions were necessary to prevent further deterioration of the registration system (App., *infra*, 22a-23a).

3. The court of appeals reversed (App., *infra*, 1a-10a). The court began by noting that there were two issues before it (*id.* at 3a):

> The first issue * * * is whether the government may prosecute only those who publicly express their conscientious refusal to obey the registration law while leaving aside all who engage in covert refusal to obey and unadvertised evasion of the law. If the answer to that question is no, the second issue is whether we should require an evidentiary hearing on the present record.

Concerning the first issue, the court noted that only those who had opposed registration "by letter to the government or public speech" had been prosecuted, and that several Justice Department officials had antic-

ipated such a result (*id.* at 4a). The court reasoned *(ibid.)*:

> A prosecutorial policy so limited clearly violates the first amendment. It selects for prosecution only those who speak out against the law. It selects people based on their expression of beliefs and the strength of their convictions.

The court rejected the government's argument that respondent was selected for prosecution simply because he had confessed, in his letter, to the commission of a crime. "The government lacks the power," the court said, "to adopt a stated policy of prosecuting people who publicly confess their failure to register in confessions which criticize government policy" (App., *infra*, 6a).

In reaching this result the court expressly rejected the Ninth Circuit's holding in *United States* v. *Wayte*, 710 F.2d 1385 (1983), cert. granted, No. 83-1292 (May 29, 1984). *Wayte* held that evidence virtually identical to that presented by respondent failed to establish impermissible selection based upon the exercise of constitutional rights. According to the court of appeals here, the decision in *Wayte* had the effect of "'permit[ting] the government to prosecute a citizen because he has spoken out rather than because he has violated the law'" (App., *infra*, at 9a, quoting 710 F.2d at 1390 (Schroeder, J. dissenting)).

Having concluded that such a policy, if proven, would violate the First Amendment, the court found it unnecessary to discuss at length the right to a hearing. It merely stated: "The government seems to agree for purposes of argument that [respondent] may be able to show at an evidentiary hearing that prosecution is limited to dissenters who publicly confess their resistance to the registration law" (App., *infra*, at 3a-4a).[6] Be-

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[6] This statement is inaccurate in two ways. In the first place, as Lippe's memos and Frankle's and Kline's affidavits show, the government's "passive" prosecution policy was never limited to

cause such a showing would—in the court's view—prove the claim of selective prosecution, respondent was entitled to a chance to make it. The court remanded the case to the district court for that purpose (*id.* at 10a).

The court denied the government's petition for rehearing (App., *infra*, 13a). Judge Wellford dissented (*id.* at 14a-18a).

REASONS FOR GRANTING THE PETITION

This case presents two closely related issues (one substantive and one procedural), on which the courts of appeals are divided, concerning the exercise of prosecutorial discretion in the enforcement of the Selective Service law. The substantive issue is whether it is per-

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self-proclaimed nonregistrants. Selective Service also referred for prosecution, and the Department of Justice processed, individuals whose alleged failure to register was reported by third parties. In the second place it is wrong to assume that nonregistrants who report their criminal conduct to the government are ipso facto "vocal" nonregistrants who have "publicly confess[ed] their resistance to the registration law." As the district court pointed out (App., *infra*, 21a):

> neither [respondent], nor previously convicted Enten Eller, publicly called attention to their non-registration prior to their indictments. Rather, the notoriety surrounding their cases appears to have come only as a result of the government's prosecution. A thorough examination of [respondent's] briefs and exhibits suggests nothing else. The only clue regarding [respondent's] pre-indictment public posture has come to this Court's attention through the extrajudicial source of a local newspaper article published on or about the date of his indictment, in which [respondent] was described as "soft spoken" and "uneasy at the center of attention." He was quoted as indicating that he is unaccustomed to publicity.

We assume, however, that the court of appeals was aware of these factual difficulties with its view of the case and found them immaterial. They were noted both by the district court *(ibid.)*, and by Judge Wellford, dissenting from the denial of rehearing en banc (*id.* at 17a). They were also fully briefed on appeal. See, *e.g.*, Appellee's C.A. Br. 37 n.13, 39 n.14.

missible for the government to focus investigation and prosecution on those who have admitted to Selective Service their failure to comply with the draft registration law, or whose failure to register has been reported by others. This issue is now before the Court in *Wayte* v. *United States*, cert. granted, No. 83-1292 (May 29, 1984). The procedural issue is whether a defendant who offers evidence that the government has pursued such an enforcement policy is entitled to an evidentiary hearing on the issue of selective prosecution.

1. The court of appeals' holding on the substantive issue of selective prosecution conflicts with the Ninth Circuit's decision in *United States* v. *Wayte*, *supra*.[7] It also conflicts with the Eighth Circuit's later en banc decision in *United States* v. *Eklund*, No. 82-2505 (May 4, 1984). The court there held, on the same facts relied upon by respondent, that "Eklund has not shown that his prosecution flowed from a motive on the part of the government to prosecute him on the basis of the exercise of First Amendment rights. Indeed, First Amendment values were not threatened, implicated, or involved in his prosecution" (slip op. 15).

For the reasons stated in our brief in *Wayte*, we believe that the court of appeals here erred, and that the Eighth and Ninth Circuits correctly decided the merits of the issue of selective prosecution. Since this Court has granted the petition in *Wayte* on this issue, however, it should defer consideration of the same question in this case pending its decision in *Wayte*.

2. a. Whatever the standard may be for proving the substantive issue of selective prosecution, there is in each case an additional question whether the defendant has alleged or shown sufficient facts to warrant holding an evidentiary hearing on such a claim. The court of appeals here did not engage in any extended discussion of

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[7] We noted this conflict in our brief acquiescing in the petition in *Wayte*, 83-1292 Gov't Br. 14. We have provided counsel for respondent with a copy of our brief in *Wayte*.

that procedural issue. It did not, for example, state what threshold test might be used to identify claims that warrant further inquiry. The court did point out that "[respondent] claims, and apparently the government does not deny, that of the approximately half million young men who have failed to register for the draft, only thirteen had been indicted by November, 1982, each of whom had expressed his opposition to the law by letter to the government or public speech" (App., *infra*, 4a). The court also found significant Lippe's March 19, 1982 memo to Jensen, particularly its statement that prosecution of a "'vocal nonregistrant will undoubtedly result in allegations that the prosecution is brought in retribution for the nonregistrant's exercise of his first amendment rights'" (*ibid.*). Finally, the court noted, "[t]he government seems to agree for purposes of argument that [respondent] may be able to show at an evidentiary hearing that prosecution is limited to dissenters who publicly confess their resistance to the registration law" (*id.* at 3a-4a). But see note 6, *supra*.

Again, the court's decision on this procedural issue conflicts with the decision in *United States* v. *Eklund*, *supra*. The Eighth Circuit there held, on the basis of the same evidence, that the defendant had failed to make the requisite threshold showing for an evidentiary hearing. See also *United States* v. *Wayte*, 710 F.2d at 1388 (holding a similar factual proffer insufficient to warrant discovery of government documents).

Although the courts of appeals have stated the threshold test for an evidentiary hearing on selective prosecution in somewhat differing terms, they all agree that the defendant must make at least some showing that the elements of the defense can be established.[8]

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[8] See, *e.g.*, *United States* v. *Ross*, 719 F.2d 615, 619-620 (2d Cir. 1983); *United States* v. *Moon*, 718 F.2d 1210, 1229-1230 (2d Cir. 1983), cert. denied, No. 83-1242 (May 14, 1984); *United States* v. *Cammisano*, 546 F.2d 238, 241 (8th Cir. 1976).

Those elements are: (1) that the defendant was singled out for prosecution while other similarly situated offenders were not; and (2) that the selection was based upon an impermissible ground, such as a desire to punish the defendant for exercising his right to free speech. *United States* v. *Eklund*, slip op. 4 (quoting *United States* v. *Catlett*, 584 F.2d 864, 866 (8th Cir. 1978)).

In this case respondent made no showing that others similarly situated were not prosecuted. The government did concede, as the court of appeals noted, that only a few of the large number of nonregistrants had been indicted. But there was no indication that the gov-

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For some examples of statements of the applicable threshold test, see *United States* v. *Jennings*, 724 F.2d 436, 445 (5th Cir. 1984) (evidentiary hearing required only when defendant presents facts "'sufficient to create a reasonable doubt about the constitutionality of a prosecution'"; no evidence presented showing prosecution motivated by impermissible considerations); *United States* v. *Hazel*, 696 F.2d 473, 475 (6th Cir. 1983) (defendant entitled to evidentiary hearing only when "prima facie showing [of selective prosecution] has been made and the defendant has proven a 'colorable entitlement' to dismissal"); *United States* v. *Brown*, 591 F.2d 307, 311-312 (5th Cir. 1979) (defendant must prove a "'colorable entitlement'" to the defense; defendant failed to make the requisite prima facie showing); *United States* v. *Catlett*, 584 F.2d 864, 866-868 (8th Cir. 1978) (evidentiary hearing required only when motion alleges sufficient facts to take the question of selective prosecution past the frivolous stage; defendant failed to establish such a prima facie case); *United States* v. *Erne*, 576 F.2d 212, 216 & n.4 (9th Cir. 1978) (defendant entitled to an evidentiary hearing when he alleges sufficient facts to take the question past the frivolous stage; here defendant alleged insufficient facts to show that the government's conduct was motivated by exercise of First Amendment rights); *United States* v. *Peskin*, 527 F.2d 71, 86 (7th Cir. 1975) (defendant must present facts sufficient to raise a "'reasonable doubt about the prosecutor's purpose'"; defendant failed to make a colorable showing that prosecution was undertaken with a motive to suppress dissent); *United States* v. *Berrigan*, 482 F.2d 171, 181 (3d Cir. 1973) (defendant must establish "colorable entitlement" to the defense).

ernment failed to prosecute anyone whose name and address came to its attention and who thereafter persisted in a refusal to register when asked to do so. On the contrary, as the Eighth Circuit noted in *Eklund*, "[o]nce [an] individual's name came to the government's attention the prosecutive mechanism was engaged" (slip op. 9). Moreover, "the uncontradicted evidence show[ed] that the government embarked on a long-range program to identify offenders, both vocal and silent, and prosecute them" (*id.* at 8).

Nor did respondent introduce any evidence tending to show that his prosecution was motivated by a desire to punish him for his exercise of First Amendment rights. Indeed, as the district court pointed out (App., *infra*, 21a), nothing in respondent's "briefs [or] exhibits suggest[ed]" that he had ever "publicly called attention to [his] non-registration prior to [his] indictment." The only communication in which respondent's views appeared was his letter to Selective Service. Lippe's March 19, 1982 memo, on which the court of appeals relied, gives no indication that the government wished to punish the writers of such letters. And it is utterly implausible to suppose that the government adopted a policy designed to retaliate against or discourage that form of communication, which only made its job of securing convictions easier while in no way discouraging others from registering.

There are substantial reasons for requiring a far more convincing showing than respondent made on these issues before holding an evidentiary hearing on a claim of selective prosecution. As the Second Circuit explained in *United States* v. *Moon*, 718 F.2d 1210, 1230 (1983), cert. denied, No. 83-1242 (May 14, 1984):

> [T]o engage in a collateral inquiry respecting prosecutorial motive, there must be more than mere suspicion or surmise. If a judicial inquiry into the government's motive for prosecuting could be launched without an adequate factual showing of impropriety, it would lead far too frequently to ju-

dicial intrusion on the power of the executive branch to make prosecutorial decisions. Unwarranted judicial inquiries would also undermine the strong public policy that resolution of criminal cases not be unduly delayed by litigation over collateral matters.

b. There are a number of significant questions concerning a defendant's entitlement to an evidentiary hearing on the issue of selective prosecution, and the scope of such a hearing, that have not been addressed by this Court. These include the nature of the threshold showing a defendant must make in order to obtain a hearing (see note 8, *supra*); whether the threshold should be higher when the government has offered a nondiscriminatory explanation of its policy through affidavits from the responsible government officials; and whether, when a hearing is granted, the government can be compelled to produce senior executive branch officials even after an explanation of its prosecution policy has been presented through other testimony. See *United States* v. *Wayte*, 710 F.2d at 1388.

In this case, as we have noted, the court of appeals said little about the requisite threshold showing. The court also provided no guidance about what additional evidence respondent should be permitted to discover and adduce at the evidentiary hearing. Nor did it specify, given its view of applicable law, what evidence the government could present to disprove respondent's claim. In fact, in light of the court's holding that the government may not prosecute those who criticize government policy while confessing their failure to register, it is difficult to imagine how the district court could ultimately do anything other than dismiss the indictment.

This case may thus not be the most appropriate vehicle for plenary consideration of the procedural issues attendant upon the right to a hearing. This is especially true since either affirmance or reversal of the Ninth

Circuit's decision in *Wayte* will almost certainly obviate the need for any kind of hearing to resolve the selective prosecution claims of respondent and other similarly situated defendants in prosecutions for failure to register. For these reasons we suggest that the Court may wish to defer consideration of this issue as well, pending its decision of the substantive question presented in *Wayte*.

CONCLUSION

The Court should defer consideration of the petition and dispose of it as appropriate in light of its decision in *Wayte* v. *United States*, No. 83-1292.

Respectfully submitted.

REX E. LEE
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
ANDREW L. FREY
Deputy Solicitor General
JOHN H. GARVEY
Assistant to the Solicitor General
JOHN F. DE PUE
Attorney

JUNE 1984

APPENDIX A

No. 82-3701

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

MARK ALDEN SCHMUCKER, DEFENDANT, APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Decided and Filed November 25, 1983

Before: MERRITT, Circuit Judge; PHILLIPS, Senior Circuit Judge; SPIEGEL,* District Judge.

MERRITT, Circuit Judge. In this direct criminal appeal, we address only this issue: Did the District Court err in denying the defendant an evidentiary hearing to determine whether he was indicted for failure to register for the draft because of his exercise of first amendment rights. We reverse and remand for the evidentiary hearing requested.

I.

Under the terms of Presidential Proclamation 4711, issued by President Jimmy Carter on July 2, 1980, males like the defendant residing in the United States,

*The Honorable S. Arthur Spiegel, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

born in the calendar year 1960, were required to register with the Selective Service during the period July 21-26, 1980. The defendant, who is concededly a sincere Mennonite, mailed to the Selective Service a letter in August, 1980, advising the government of his intention not to register for the draft and objecting to the registration. He explained that registering would violate his religious convictions. He included his name, current and permanent address, and his age eligibility. He rejected efforts by the Federal Bureau of Investigation and a government attorney to persuade him to register.

The Grand Jury returned a one-count indictment charging that defendant knowingly and willfully failed, evaded, and refused to submit to registration, in violation of 50 U.S.C. §§ 453 and 462. On October 5, 1982, the jury returned a verdict of guilty.

Defendant assigns many errors in the conduct of his trial, including the claim that the District Court refused to conduct an evidentiary hearing on his claim that the government abridged his rights of free speech and religious free exercise by prosecuting only those persons who both (a) refused to register *and* (b) publicly expressed disagreement with the draft registration law. We conclude that defendant Schmucker is entitled to a hearing on his charge of selective prosecution. Accordingly, we reverse.

II.

Defendant claims that hundreds of thousands of young men have not registered but that only those who have publicly disagreed with the registration law have been prosecuted. The government responds that no constitutional violation has occurred because the government may validly select for prosecution only protestors who call attention to themselves by publicly confessing their failure to register. The government argues that the District Court, therefore, correctly denied the defendant's motion for an evidentiary hear-

ing on this issue because his claim of selective prosecution does not state a valid defense, even assuming the facts alleged to be true.

In *United States* v. *Hazel*, 696 F.2d 473, 474 (6th Cir. 1983), we recently set out a two part test governing when an indictment must be dismissed on grounds of selective prosecution. Under the test an indictment must be dismissed if (1) the defendant has been "singled out" while other similarly situated violators are left untouched, and (2) the defendant's selection for prosecution was "based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights." A defendant is entitled to an evidentiary hearing if he makes a preliminary showing that there is a legitimate issue concerning the government's conduct during this standard.

Although prosecutorial discretion is very broad under our system, *see Oyler* v. *Boles*, 368 U.S. 448 (1962); *Confiscation Cases*, 74 U.S. 454, 457 (1868) ("public prosecutions ... within exclusive discretion of" prosecutor), it is obvious that the government cannot selectively enforce a law by prosecuting only Republicans, or only Caucasians, or only Southerners who violate the law. For the government cannot adopt a prosecution policy which, if adopted by Congress as a statute, would be unconstitutional. The first issue before us then is whether the government may prosecute only those who publicly express their conscientious refusal to obey the registration law while leaving aside all who engage in covert refusal to obey and unadvertised evasion of the law? If the answer to that question is no, the second issue is whether we should require an evidentiary hearing on the present record.

III.

The government seems to agree for purposes of argument that the defendant may be able to show at an evi-

dentiary hearing that prosecution is limited to dissenters who publicly confess their resistance to the registration law. The defendant claims, and apparently the government does not deny, that of the approximately half million young men who have failed to register for the draft, only thirteen had been indicted by November, 1982, each of whom had expressed his opposition to the law by letter to the government or public speech. Moreover, on March 19, 1982, Mr. Lawrence Lippe, Chief of the General Litigation and Legal Advice Section of the Criminal Division of the Department of Justice, wrote a memorandum to Mr. D. Lowell Jensen, Assistant Attorney General in charge of the Criminal Division, describing the government's prosecutorial policy in these cases as a "passive enforcement" policy based on "self reporting." He says the group of "self reporters" consists of Mennonites and "others with religious or moral objections" and "vocal proponents of nonregistration." Mr. Lippe advised his superior that the "present scheme" of prosecution of only "the vocal nonregistrant will undoubtedly result in allegations that the prosecution is brought in retribution for the nonregistrant's exercise of his first amendment rights."

The question before us then is whether a prosecutorial policy violates the first amendment if it is directed solely at "the vocal non-registrant" who openly objects to the law on religious, moral or political grounds. If so, the defendant is entitled to an evidentiary hearing in order to see if he can prove his allegations. If not, no evidentiary hearing is necessary.

IV.

A prosecutorial policy so limited clearly violates the first amendment. It selects for prosecution only those who speak out against the law. It selects people based on their expression of beliefs and the strength of their convictions. It excludes, and therefore rewards, thousands who engage in covert noncompliance and evasion

of the law, including all those who would confess their violation if sought out and interviewed. It discourages dissenters from expressing their criticisms of government policy.

The government's main argument is that the defendant has failed to establish that his selection "was based on an impermissible criterion." It argues that although the defendant "conjectures that the decision to prosecute him was deliberately based on the exercise of his first amendment rights, the record clearly demonstrates that the appellant has been prosecuted simply because he took it upon himself to report his own criminal misconduct to the Selective Service and has, since the time of his incriminating correspondence to the government, rejected the various opportunities extended to him to register and thereby avoid criminal liability." This argument in turn depends on the acceptance of the government's argument that the defendant's letter "was not simply an exercise of the right to petition the government to protest perceived wrongs." The letter was, in addition, an unequivocal confession of the commission of a crime which virtually invited the initiation of criminal prosecution. (Govt. Brief pp. 37-38.)

The trouble with this prosecutorial selection distinction is that a law punishing only draft nonregistrants who publicly confess by vocalizing their disagreement with the government's policies would violate the principle that "Congress shall pass no law abridging free speech." Like the Alien and Sedition Acts, such a law visits punishment on people solely because they have expressed rather than remained silent about their opposition to the government. It is no less a violation of the first amendment for the Executive Branch to give the draft registration law this construction for purposes of prosecution. As Professor Tribe has noted, "in the very controversy over the Alien and Sedition Acts . . . a powerful theory of first amendment freedoms first crystal-

lized ... [viz.] that government lacks constitutional power to silence its critics." L. Tribe, *American Constitutional Law* § 12-12, at 632 (1978).

The government is correct that it can validly pass a law prohibiting fraud and libel based on speech and may perhaps be able to limit prosecutions generally or in certain classes of cases to those involving people who have made confessions. Such laws, though punishing speech, are content neutral. The government may not, however, limit its punishment in fraud, libel, and confession cases to only those cases in which the defendant criticizes the government and its policies. That standard is not content neutral. *See generally Oyler* v. *Boles, supra; Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). Similarly, a law is not content neutral that limits draft prosecutions to nonregistrants who "vocalize" their religious, moral or political objections to the government. The government lacks the power to adopt a stated policy of prosecuting people who publicly confess their failure to register in confessions which criticize government policy.

A government's prosecution policy must be content neutral unless there are compelling justifications. In *Carey* v. *Brown,* 447 U.S. 455 (1980), in striking down a state statute that generally barred picketing of residences or dwellings but did not prohibit peaceful labor picketing of a place of employment, the Supreme Court declared that "[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finally tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Id.* at 461-62. *See also Widmar* v. *Vincent,* 454 U.S. 263 (1981); *United States* v. *O'Brien,* 391 U.S. 367 (1968). In *United States* v. *Falk,* 479 F.2d 616, 623 (7th Cir. 1973) (en banc), the Court of Appeals applied similar reasoning to

a selective prosecution case when it concluded that "it is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups ... by selective enforcement of a broad prohibiting statute." *Quoting Cox* v. *Louisiana*, 379 U.S. 536, 557-58 (1965). *See also United States* v. *Steele*, 461 F.2d 1148 (9th Cir. 1972).

Although the government argues in the instant case that it sought to prosecute first those young men who brought attention to themselves by confessing either to the government or in public their failure to register, defendant Schmucker's letter to the Selective Service—and apparently the "confessions" of the other defendants as well—contained more than the mere statement that "I have broken the law." The defendant has alleged and sought to present evidence to the District Court which suggests that the government prosecuted through its "passive enforcement" system only young men who made confessions through their criticisms of governmental policy.

The fact that criticisms of governmental policy may be accompanied by or construed as confessions does not make such criticisms any less an exercise of first amendment rights. As Justice Harlan warned in *Cohen* v. *California*, 403 U.S. 15, 26 (1971) (invalidating under first amendment a state prosecution for disturbing peace by wearing jacket bearing words "Fuck the Draft"), "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." Similarly in the present case, the defendant claims—with some support in the record—that the government is forbidding

criticisms of itself under the guise of prosecuting a form of confessional words.

Cohen is analogous to the instant case. There the prosecutors argued that the slogan was obscene and contained "fighting" words and therefore was not entitled to protection. The accused argued that the slogan had a political meaning, that he used the obscenity to dramatize that meaning. The court held that the two characterizations merged and that the context of the prosecution suggested a strong inference that the state brought the case in part because of the political meaning of the slogan. This case lends itself to similar analysis. The prosecution argues "confession," and the accused argues political and religious "protest."

The government contends that we should follow the decision in *United States* v. *Wayte*, 710 F.2d 1385 (9th Cir. 1983), which held that a young man who publicly expressed his refusal to register had not been selectively prosecuted. The majority on the Ninth Circuit panel concluded that defendant Wayte, who presented evidence of selective prosecution similar to that presented by the defendant here, had "not shown that he was selected from the larger group because of his exercise of his constitutional rights." *Id.* at 1387. The *Wayte* court upheld as valid the government's explanations that its system was necessary because "(1) the identities of other violators were not known and (2) the violators who [publicly] expressed their refusal to register made clear their willful violation of the law." *Id.* at 1388.

The *Wayte* court's blanket rejection of the trial court's factual findings of selective prosecution does not impress us. We are persuaded by the contrary opinion in *United States* v. *Falk*, *supra*, and by Judge Schroeder's thoughtful dissent in *Wayte*. In *Falk*, the Seventh Circuit Court of Appeals *en banc* concluded that the defendant's presentation of evidence regarding

his prosecution for failure to possess a registration card was sufficient to shift the burden to the government to prove non-discriminatory enforcement of the law and that the defendant was entitled to be heard on his claim that the prosecution had been initiated to punish the defendant's and to chill others' exercise of First Amendment freedoms. The *Falk* court's review of the law governing prosecutorial discretion led that court to conclude that

> just as discrimination on the basis of religion or race is forbidden by the Constitution, so is discrimination on the basis of the exercise of protected First Amendment activities, whether done as an individual or, as in this case, as a member of a group unpopular with the government.

479 F.2d at 620.

Citing *Falk*, Judge Schroeder in her dissent in *Wayte* noted that "where a vocal dissenter appears to have been singled out for prosecution, the government must accept the burden of proving nondiscriminatory enforcement." 710 F.2d at 1390. Judge Schroeder also emphasized that the District Court in *Wayte* had not made any clearly erroneous findings of fact regarding the selective prosecution issue and that "the effect of the majority's opinion is to permit the government to prosecute a citizen because he has spoken out rather than because he has violated the law. The result weakens our indispensable but fragile freedom to express unpopular ideas." *Id.*

In accordance with the reasoning expressed in *Cohen* v. *California* and by the Seventh Circuit in *Falk* and by Judge Schroeder in *Wayte*, we conclude that defendant Schmucker is entitled to a full evidentiary hearing on his claim that the federal government selectively prosecuted him because of his opposition to registration based on his exercise of first amendment rights.

Accordingly, it is so ordered. We retain jurisdiction over the other issues raised on this appeal, pending the outcome of the evidentiary hearing.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-3701

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

MARK ALDEN SCHUMUCKER, DEFENDANT-APPELLANT.

[Filed Nov. 25, 1983]

Before: MERRITT, Circuit Judge; PHILLIPS, Senior Circuit Judge; and SPIEGEL, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THE CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is

hereby reversed and remanded for an evidentiary hearing as to the exercise of the first amendment right, in all other issues raised on appeal this Court retains jurisdiction.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,

JOHN P. HEHMAN, *Clerk*

Issued as Mandate: MARCH 22, 1984

A True Copy.

Attest:

/s/ George McCarthy

GEORGE MCCARTHY, *Deputy Clerk*

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-3701

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARK ALDEN SCHMUCKER, DEFENDANT-APPELLANT

[Filed Mar. 12, 1984]

ORDER DENYING PETITION FOR REHEARING EN BANC

Before: MERRITT, Circuit Judge; PHILLIPS, Senior Circuit Judge; SPIEGEL,* District Judge

A majority of the Court having not voted in favor of en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

JOHN P. HEHMAN, *Clerk*

*The Honorable S. Arthur Spiegel, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-3701

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

MARK ALDEN SCHMUCKER, DEFENDANT-APPELLANT.
[FILED MAR. 12, 1984]

DISSENT FROM DENIAL OF HEARING *EN BANC*

WELLFORD, Circuit Judge, dissenting:

I respectfully dissent from the failure of this court to rehear *en banc* the appeal in this case following the opinion of my colleague, Gilbert S. Merritt, entered November 25, 1983. I believe this proceeding "involves a question of exceptional importance" as set out as a prerequisite for determination of causes by the court *en banc*. Fed. R. App. P. 35(a)(2). Within the time specified under this rule, a petition for rehearing with suggestion for rehearing *en banc* was filed by the United States Attorney for the Northern District of Ohio. An attorney from the General Litigation and Legal Advice Section of the Criminal Division of the United States Department of Justice joined in this petition and signed the brief in support thereof, which I found persuasive.

This case involves the national Selective Service draft registration program instituted by the President and procedures involved for violation of the registration requirement (50 U.S.C. §§ 453 and 462). The opinion of Judge Merritt in this case follows the dissenting opinion of a judge of the Ninth Circuit; disregards the majority opinion of that court;[1] and overrules the action of the

[1] *See, United States* v. *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

trial court in denying defendant-appellant Schmucker's motion for an evidentiary hearing on his claim of selective prosecution prior to his conviction by jury trial. Schmucker refused to register as required by law despite "efforts by the Federal Bureau of Investigation and a government attorney to persuade him" to the contrary. (P. 2, Slip Op. of Judge Merritt). His contention with respect to selective prosecution was that the government was "prosecuting only those persons who . . . publicly expressed disagreement with the draft registration law." *Id.* at 2.

Judge Merritt makes reference in his opinion to an earlier decision of this court in *United States* v. *Hazel*, 696 F.2d 473 (1983), which also dealt with a claim of selective prosecution. *Hazel*, however, imposes a "heavy burden" on a defendant asserting selective prosecution, claiming a "protestor" status to show (1) that others similarly situated have not been prosecuted and (2) that the decision to prosecute was made invidiously or in bad faith.

The appellant in this case wrote a letter to the Selective Service Department presenting his refusal to register; the defendant in *Hazel* was a vocal opponent of and protestor against the tax system of the government. That defendant in *Hazel* was one of the "highly visible leaders of their movement" was found to be insufficient to require a hearing despite first amendment claims. *Hazel* at 475. Citing *Oyler* v. *Boles*, 368 U.S. 448 (1962), the *Hazel* court held "even if Hazel and Lott had conclusively proven their charge that the Government initiated prosecution because of the great notoriety of their protests, that fact would not as a matter of law, be an impermissible basis for prosecution." *Id.* at 475.

This case may fit another prerequisite for an *en banc* hearing "to secure or maintain uniformity of its [this court's] decisions" Under Fed. R. App. P. 35(a)(1) as

Schmucker's situation, even if this assertion were given credence, would appear to be no stronger than Hazel's.

Attached to the petition for rehearing was a memorandum of the government, dated March 19, 1982, which was apparently submitted in evidence by defendant-appellant in support of his selective prosecution claim that the government prosecuted "protestors only," such as himself. It was indicated there that an active system for identifying non-registrants was being implemented prior to the time of this indictment. This letter memorandum was referred to in Judge Merritt's opinion. It also indicated that identification of potential registration violators was complicated, and that the system would not be productive until sometime in 1983. It noted that 183 identifications of non-registrants had been made based on reports from violators themselves, (defendant-appellant himself fits within this classification) and from third parties. In the interim, while the program was being implemented, the United States would undertake to prosecute known violators, such as Mr. Schmucker, under the following standard:

> Assuming that the "active identification" nonregistrant class is so large that prosecution of everyone is impracticable, we could apply the *same* selection standard to the "passive" referrals as to the "active" referrals. Not only would we avoid some of the "passive" legal problems, we could probably even avoid some of the "passive" prosecutions. Nevertheless, we cannot recommend putting the "passives" on hold until the "actives" are referred. We are precluded from doing so by one factor—time. If the Department of Justice waits until late this year to institute prosecutions of nonregistrants, *the registration scheme will suffer greatly*. Consequently, we reluctantly conclude that United States Attorneys should be directed to proceed to prosecution with the matters which have already been referred to them.

Memorandum (3/19/82) at 2 [emphasis added]. This standard, it appears to me, was carefully considered and found to meet constitutional standards in *Wayte* The government's standard was found in *Wayte* to be a good faith assessment by those charged with prosecution of registration law violators that acting in a timely fashion against known violators to preserve the integrity of the law was deemed important to the national defense.

> The government offers two explanations for its selection procedure: (1) the identities of those violators were not known, and (2) violators who expressed their refusal to register made clear their willful violation of the law.
>
> The first explanation is logical and does not evidence impermissible motives. Moreover the government has made an effort to establish a system for identifying nonregistrants who are not otherwise brought to its attention.
>
> The second justification is permissible also. The government may, in making prosecutorial decisions, "consider whether the potential defendants have, by their public statements or otherwise, made clear their actual or intended participation in the illegal activity." *Taylor*, 693 F.2d at 923 (footnote omitted).

Wayte, 710 F.2d 1385, 1388.

In this case the district court had before it the policy of Department of Justice and the local United States Attorney's office that it prosecutes only those who, like Schmucker, confess to their non-registration violation *and* others who are reported to it. Only those who continue to refuse to register after receiving letters and visits from the F.B.I. are prosecuted. It would appear that those who persist in not registering are being prosecuted under the policy already made known to the trial

court, this court, and the Ninth Circuit Court.[2] I believe this issue should have been considered by our entire court.

[2] Apparently, the Eighth Circuit Court of Appeals also considers this issue of such moment it has elected to hear appeals *en banc* sua sponte. (*United States* v. *Martin and Eklund*, No. 82-2425 and No. 82-2502 (8th Cir.)

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Criminal Action No. 82-133A

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK ARDEN SCHMUCKER, DEFENDANT

ORDER

ALDRICH, J.

Pending before the Court is defendant Mark Schmucker's Motion to Dismiss for Selective Prosecution. The Court, having fully considered the briefs, affidavits, and exhibits filed by both the defendant and the government, hereby denies the defendant's motion.

A long-recognized rule of law forbids government officials from enforcing criminal statutes in an unjustly discriminatory fashion. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886). On the other hand, the government is entitled to the presumption that it is prosecuting in a non-discriminatory manner. *United States* v. *Saade*, 652, F.2d 1126, 1135 (1st Cir. 1981). Defendant Schmucker has the burden of overcoming this presumption by establishing a *prima facie* case that: (1) while others similarly situated have not been prosecuted for conduct similar to his, Schmucker has been singled out for prosecution; and (2) Schmucker was singled out for prosecution by the government for an impermissible reason such as race, religion, or the exercise of his

First Amendment right to free speech. *United States* v. *Berrios*, 501 F.2d 1207, (2d Cir. 1974).

Had the defendant here presented any evidence to suggest the existence of a *prima facie* case of selective prosecution, an evidentiary hearing on that issue would be in order. However, the defense has not carried its burden and has presented nothing persuasive to support its position.

I

This Court finds that the defendant, Mark Schmucker was not singled out for prosecution. It is true that there are many other men who have not yet been prosecuted. Mark Schmucker is only the third person in the nation to be prosecuted. The mere fact of his early prosecution is not evidence of impermissible intentional discrimination on the part of the government. Courts have recognized that, when numerous offenders and limited prosecutorial resources are involved, the government may choose to select its strongest cases for prosecution. *U.S.* v. *Wilson*, 639 F.2d 500, 504 (9th Cir. 1981).

The defendant lists seven other persons indicted for the same offense and claims kinship with them through an alleged pattern of discrimination. All those indicted, Schmucker alleges, have been vocal opponents of registration who are being prosecuted for their public stance. The affidavits of these men reveal varying degrees of intensity in their protests. Several of them have thrust themselves repeatedly into the public eye through public appearances in their own communities and on national television. The outspokenness of these non-registrants might prompt suspicion that the government was indeed retaliating against them for their open defiance of the law. However, not all those indicted have publicly denounced registration. If Schmucker, prior to his indictment, had been as vocal as some of the others, *i.e.*, Benjamin Sasway and David

Wayte, this Court might well find a need for an evidentiary hearing on the issue of selective prosecution.[1]

However, neither defendant Mark Schmucker, nor previously convicted Enten Eller, publicly called attention to their non-registration prior to their indictments. Rather, the notoriety surrounding their cases appears to have come only as a result of the government's prosecution. A thorough examination of defendants' briefs and exhibits suggests nothing else. The only clue regarding Schmucker's pre-indictment public posture has come to this Court's attention through the extrajudicial source of a local newspaper article published on or about the date of his indictment, in which Schmucker was described as "soft spoken" and "uneasy at the center of attention". He was quoted as indicating that he is unaccustomed to publicity.

II

A.

Schmucker's claim that he was singled out because he wrote a letter to Selective Service does not support his claim of unjust discriminatory prosecution. It is clear that Schmucker expedited his prosecution by reporting himself in his letter which begins: "I have violated...". As noted in tax protester cases raising similar selective prosecution claims, it should not be surprising that those who seek to attract enforcement attention to themselves sometimes succeed. *See, Wilson, supra.* This court finds that an indictment resulting from the writing of a self-reporting letter does not indicate *prima facie* selective prosecution. Obviously, if this

---

[1] It may be noted that in *Sasway,* the district court did indeed hold a hearing on the issue of selective prosecution, and after two days of testimony, concluded that the government was not selectively prosecuting Sasway. Order of August 19, 1982, U.S. District Court, Southern District of California, CR Case No. 820504GT.

Court were to hold otherwise, *any* non-registrant could avoid prosecution simply by writing a letter, advising the government of his violation of the law. This Court cannot base the grant of an evidentiary hearing on Schmucker's letter.

Moreover, this Court finds no reason to disbelieve the government's contention that, under the passive enforcement system, non-registrants other than those who have written letters are subject to prosecution. The fact that persons who write letters and unequivocally express their intent (as Schmucker did) not to register provide the government with strong cases for prosecution should not preclude the government from selecting those strong cases for prosecution. The fact that the government chooses registrants who are most adamant indicates a government preference for winning its cases. It does not show discriminatory prosecution.

B.

The defendant charges that the government's passive detection system is unjustly discriminatory and questions why an active system is not employed. Defendant's own exhibits of government memoranda convince this Court that the government is not invidiously preferring passive detection. While aware of the problems of appearances of selective prosecution, the government repeatedly (Exhibits 12 and 14) stresses that active detection is being implemented to achieve a more random group of indictments. In defendant's Exhibit 12, the government memorandum reveals that the active system can begin detecting non-registrants no sooner than October, 1982. In the same memo, the government stresses the need for immediate prosecutions to prevent further deterioration of the Selective Service System. (Defendant's Exhibit 12).

This Court declines to second-guess the government's decision to employ the passive system, or its timing, other than to inquire whether the passive system is

tantamount to allowing the government to unjustly prosecute in a discriminatory manner. Government memos (Defendant's Exhibits 13 and 14) repeatedly stress that the Justice Department should not select the first registrants for prosecution, nor the first districts in which prosecutions should occur. The fact that the government only this month has acquired an active system for identifying non-registrants, is not evidence showing that the government has unjustly passed over other known non-registrants in favor of selectively prosecuting Schmucker. Such a showing is required for defendant to meet the *Berrios* test.

Defendant has failed to show that he has been singled out for prosecution, while others similarly situated were not. Moreover, defendant has not shown that the government's decision to prosecute him was based upon impermissible, invidious considerations.

For the above reasons, defendant's Motion to Dismiss for Selective Prosecution is denied.

IT IS SO ORDERED.

/s/ Ann Aldrich

ANN ALDRICH
United States District Judge

Supreme Court, U.S.
FILED
AUG 14 1984
ALEXANDER L. STEVAS
Clerk

No. 83-2035

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

MARK ARDEN SCHMUCKER, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN RESPONSE FOR RESPONDENT MARK ARDEN SCHMUCKER

ELIZABETH REILLY
WILLIAM T. WHITAKER
Counsel of Record
73 East Mill Street
Suite 300
Akron, Ohio 44308
(216) 762-2087

JOHN LAWSON
12321 Euclid Ave.
Cleveland, Ohio
44106

DALE A. BAICH
900 Penton Plaza
Cleveland, Ohio
44114

Attorneys for Respondent

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QUESTIONS PRESENTED

1. Whether a prosecutorial policy whose inevitable effect is to identify solely those nonregistrants who openly object to the law upon religious, moral, and/or political grounds violates the First Amendment?

2. Whether such a policy, known prior to implementation to focus disproportionately upon persons exercising First Amendment rights, and persisted in despite the expected results of prosecuting only such persons, also violates the Fifth Amendment?

3. Whether respondent was entitled to an evidentiary hearing upon his claim of unconstitutionally selective prosecution based on such facts?

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

NO. 83-2035

UNITED STATES OF AMERICA, PETITIONER

v.

MARK ARDEN SCHMUCKER, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR MARK ARDEN SCHMUCKER

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Pet. App. A, p. 1a-10a) is reported at 721 F.2d 1046. The order and opinion of the United States District Court for the Northern District of Ohio, Eastern Division, denying Respondent's motion to dismiss for selective prosecution (Pet. App. D p. 19a-23a) is

unreported.

JURISDICTION

The judgment of the court of appeals was issued November 25, 1983. A petition for rehearing with suggestion for rehearing en banc was denied on March 12, 1984. On May 2, 1984, Justice O'Connor extended the time for filing a petition for writ of certiorari to June 10, 1984. The petition was filed and docketed on Monday June 11, 1984. On July 6, 1984 respondent was granted an extension of time within which to file his response to the petition for a writ of certiorari to and including August 14, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 22, 1982, Respondent was indicted for failing to register with Selective Service pursuant to Presidential Proclamation No. 4771, in violation of 50 U.S.C. App. (and Supp. V) 453, 462. After pretrial motions to dismiss, to com-

pel discovery, and to hold an evidentiary hearing upon the issue of selective prosecution were overruled, respondent proceeded to jury trial on September 30, 1982 and was convicted on October 5, 1982. Respondent was sentenced under the Youth Corrections Act to three years' probation, conditioned upon serving 24 months out of state at a home for profoundly mentally retarded adults. He began serving as ordered, and served until his release in December, 1983 following the reversal and remand by the court of appeals. Respondent was fined $4,000.00 and assessed costs. Respondent was specifically not required to register:

> This Court believes that such a condition would insult what this Court believes to be an honest religious conviction on your part. (CA App. p. 12).

1. On July 2, 1980, by Presidential Proclamation 4771, all males born in 1960 and residing in the United States were ordered to register with Selective Service during the week of July 21, 1980. Respondent was born October 4,

1960 and is a citizen. He was raised as a Mennonite and was attending Goshen College, a Mennonite school. As an adherent to the philosophically pacifist Mennonite faith, respondent was religiously, morally, and politically opposed to any war-making activities, which he undisputedly sincerely believed registration with Selective Service to be. On August 10, 1980, he wrote to the Director of Selective Service, giving his name, his current and permanent address, and his age eligibility for registration. The letter explained, inter alia:

> I am writing to inform you that I have violated the Military Selective Service Act by not registering. I feel that I must refuse to comply with this law because registering would force me to compromise my Christian faith.
>
> I believe that war in any form is wrong . . . . As a Christian, I feel that I must avoid participation in the conscription process by not registering because conscription is an inherant (sic) part of the war process.
>
> At this point, I feel that I should emphasize that I am not anti-American. I consider myself privileged to live in a country where basic human rights,

> self-government, and religious freedom are granted to the citizens. I am not opposed to serving this great land of ours by working in a hospital, teaching, or by working at some other type of public service job . . . .

(C.A. App. p. 24; App. A infra).

2. Other persons self-reported their refusal upon religious, moral, and/or political grounds to register, and together with persons reported by others as non-registrants, were referred to Selective Service. Selective Service devised a system designed exclusively to pursue these persons and to attempt to secure compliance prior to instituting prosecution. As Edward Frankle, designer of this "passive detection system," stated under oath: "Selective Service has done nothing in these cases to attempt to determine the identities of people who have not registered." (C.A. App. p. 48). All letters objecting to registration were referred to Selective Service for action, including those which were obviously, on their face, written by ineligible

persons, be they female, too young, or too old. (C.A. App. pp. 49-50 (Frankle affidavit)). These latter were culled out.

Selective Service sent a registered certified letter to each person so identified, including respondent, stating the obligation to register, his apparent non-compliance therewith, the potential penalties therefor, and requesting registration on the enclosed form.

Those persons, including respondent, who failed to comply after receipt of this letter (as evidenced by signed receipts), were referred to the Department of Justice for further action. Respondent's name was referred on October 21, 1981 in the second group of such referrals. The Department of Justice sent a second letter seeking registration from Schmucker. Respondent again declined to register, as he did during the national grace period, unable to compromise his principles.

Pursuant to government policy, respondent's case was then referred to the local United

States Attorney and to the FBI. On June 22, 1982, an FBI agent spoke with Mr. Schmucker, who reiterated his awareness of the registration law and stood by his religiously motivated opposition to compliance. He explained the basis of his opposition, and stated he had given these reasons in the August 10, 1980 letter. He also spoke of a letter to President Reagan in which he spoke of many issues troublesome to him, including registration. He further explained "he felt that all wars were wrong, and therefore he could not support any military organization . . . . (that) if he registered with Selective Service, he would be condoning the escalation of a nuclear arms race . . . . (and that) in not registering with Selective Service, he would cause the United States Government to be delayed in mobilizing their armed forces since they would have to take some time to handle his particular case." (C.A. App. pp. 132-133 (FBI Agent-Quigley)).

Thereafter, an assistant United States

Attorney contacted respondent; his requests for compliance were met by respondent's explanation again of his principled commitment to his conscience. Convinced of respondent's sincerity, the local prosecutor contacted the Justice Department attorney responsible for supervising Selective Service prosecutions, David J. Kline, seeking "authority to decline prosecution primarily because the alleged non-registrant was a Mennonite seminary student." Kline refused. (C.A. App. p.67 (aff't Kline)). That assistant U.S. Attorney filed an affidavit stating in direct contradiction that: "The officials of the United States Department of Justice did not decide, nor did they influence the decision to present an indictment against Mark Schmucker." (C.A. App. p. 78).

Respondent testified at trial that he opposed registration because it would facilitate mobilization, permit the country to prepare for war more easily, and thus involve him in contributing to the warmaking process.

Respondent testified to his purpose in sending the letter: not simply to disagree with the law but also "at least let the Government know why I was breaking it." (C.A. App. 142).

3. Respondent's motion to dismiss for selective prosecution challenged the entire system of prosecuting, from "passive detection," up to declining prosecution if registration was secured in one of the numerous required contacts, and including the direct involvement of the Justice Department in the decision to prosecute. Respondent and every other person indicted were identified and pursued because they had exercised their First Amendment rights to petition for redress, of religious freedom, and/or to speak in opposition to government policy. No "quiet" non-registrant of the approximately half-million non-registrants could be identified for prosecution under this policy. Respondent noted the chilling effect upon the exercise of such vital First Amendment rights which inexorably flowed from this

policy.

The government has never disputed that there was a sizable pool of nonregistrants ("enormous numbers" neither "identified nor prosecuted") nor that all of the indictees shared the common feature of expressed dissent, either as self-reporters or vocal opponents. Indeed, the government recognized that all of the potential indictees would necessarily be self-reporters, or if third party referrals, have a "high probability" of being "vocal proponents of draft non-registration." (Wayte Jt. App. pp. 290-91).

The government thus recognizes that the system and policy it persisted in applying identified only expressed dissenters and pursued only those with strong convictions of opposition. In fact, the government insists that respondent and all the indictees of the passive system form a separate class which can be treated differently (not "similarly situated" to every other willful nonregistrant) because they have been identified

to the government. (Petition p. 14-15; Wayte v. United States, Brief in Response to Petition for Certiorari p. 17 fn. 14, p. 18-19.) That their identification resulted solely from their expressions of dissent is a decisive factor which the government has admitted. Identification based upon expressed dissent as the classifying factor is the very essence of content-based distinction.

4. Documents submitted to the trial court established that

a. respondent is a member of a class of nonregistrants singled out as having protested - directly or indirectly - the registration law; and

b. he was noticed and treated individually as a target for prosecution because of his known and persistent commitment to his religious beliefs.

a. As this Court is aware from the Briefs and Record submitted in David Alan Wayte v. United States of America, No. 83-1292 (cert. granted

May 29, 1984), the Department of Justice in particular was well aware long before prosecutions commenced that the design of the passive detection system would inevitably result in prosecuting religious dissenters and vocal opponents of registration. The Department recognized that an "active" system would obviate selective prosecution problems by providing "appropriate" selection criteria.

The government argues that "delay" in prosecuting in July of 1982 would harm the registration system by encouraging noncompliance. However, since necessarily only dissenters were indicted - a fact obvious to everyone including the government, the indictees, the media, the courts, and the public - the passive system obviously encouraged quiet noncompliance while blatantly discouraging expressed dissent. Even the government admitted the policy was designed to focus on the "most adamant"; i.e., principled, nonregistrants.

The government has stated to this Court that the prosecutorial policy

> had the incidental effect of identifying opponents of registration, an eventuality anticipated in Department of Justice correspondence. (Brief in Response to Petition, Wayte v. United States, p. 18)

The government has further tacitly admitted to this Court that the passive enforcement policy resulted in prosecutions "only of individuals who criticized government policy," and explicitly admitted that those indicted were identified for having "brought themselves to the attention of Selective Service, and their reasons for doing so have obviously been opposition to the draft . . ." (Wayte v. United States, Brief in Response to Petition for Certiorari, No. 83-1292, p. 15 fn. 10).

The government's knowledge of high media interest in the first nonregistrant indictments supports an expectation of a chilling effect. (See C.A. App. p. 34-35 (fn. 3)). The government either pursued dissenters intentionally, or exploited

the chilling effect of prosecuting avowed opponents of its policy.

b. Despite the commonality of the system of prosecution which singled out both Mr. Wayte and Mr. Schmucker, respondent's case differs somewhat in that his indictment was personally discussed by top level officials, and local prosecutorial discretion was specifically overriden.

First, the government categorized religious and political dissenters separately. (C.A. App. p. 33). The Mennonite dissenters were specifically noted on March 19, 1982 to constitute a large number of self-reporters. (C.A.App. p.42 et seq). The local prosecutor sought to decline prosecution of respondent because of his religious sincerity, but was refused authority by the Justice Department. (C.A. App. p. 67). Shortly after this contact, a memo stated the Department "tentatively expect(s) an indictment to be returned on July 19, 1982, in the Northern District of Ohio. The expected defendant is a

Mennonite Seminary Student." (C.A. App. p. 45).

Respondent was notable to the government because of his religious beliefs and affiliations. The Department of Justice chose to prosecute him for the symbolic impact of these facts.

5. The Sixth Circuit Court of Appeals, recognizing the First Amendment violation, reversed respondent's conviction and remanded for an evidentiary hearing.

ARGUMENT

The government suggests that this Court defer consideration of its petition until there has been a final disposition of the case of Wayte v. United States of America, No. 83-1292 (cert. granted May 29, 1984). Respondent opposes the request, which could result in a determination being reached in his case without his participation, for several reasons.

1. The Sixth Circuit's penetrating analysis of selective prosecution as a First

Amendment issue is the precise conflict upon which the government based its acquiescence in the granting of the Wayte petition. It has prompted the government to assert as fact many subsequent events in Selective Service enforcement for which there is no basis in any record. (E.g., Wayte Brief in Response to Petition pp. 7-8 fn. 4; Petition pp. 6-7 fn. 3). Consideration of this case will bring before the Court the actual ruling which the petitioner disputes, with the record supporting it, and also provide the Court with a vehicle to determine fully the question of selective prosecution, with its substantive and procedural ramifications.

Respondent submits that both the result reached by the Sixth Circuit herein, and the analysis used to base it, are correct and should be adopted by this Court. This would obviate the need to review respondent's case, as it is currently correctly decided.

2. Respondent notes that this Court

is obviously convinced of the importance of the question raised concerning selective prosecution, having already determined to hear the Wayte case. Respondent submits that a full consideration of the question accepted for review in Wayte will be enhanced by consolidating his case for consideration therewith. Then, the panoply of relevant facts will be presented to this Court with as full a record as possible. For instance, the identification and classification of religious dissenters, as well as vocal opponents, separated by the government itself when evaluating its prosecutorial policy, will be before the Court in Schmucker more fully than is possible in Wayte. Furthermore, the question of prosecutorial discretion - urged by the government as the key issue in Wayte (Brief in Response to Petition p. 12) - is brought into focus more sharply by the refusal to permit the local prosecutor to exercise such discretion in Schmucker.

3. The government agrees that the

same issue is raised by both cases (and numerous others), in all of which individual records have been compiled. This Court should benefit from the litigation already conducted to assure itself of the most comprehensive presentation and thorough understanding of the question involved. Since it is a system which is being challenged, the opportunity to see that system at work in as many circumstances as possible should enhance the Court's information and ultimate deliberation and decision by providing a more complete picture. Nuances and patterns will be more readily discernible.

As the petitioner challenges the Sixth Circuit's ruling in each case pending in this Court, respondent will now briefly address its major arguments against that ruling.

A. The petitioner insists that direct proof of subjective bad faith motive - "retaliation" "retribution" - must be demonstrated to establish that a prosecutorial policy identify-

ing only those who have exercised First Amendment rights is unconstitutional. The government contends that admissions of its own bad faith will alone suffice to meet this "smoking gun" requirement. The reason advanced to support this radical limitation of acceptable proof is judicial deference to executive "discretion."

This Court's opinions touching upon selective prosecution have never required admissions of evil motive, but use the word "deliberate" to describe impermissible selectivity. E.g., Oyler v. Boles, 368 U.S. 448, 456 (1962). The seminal case of Yick Wo v. Hopkins, 118 U.S. 356 (1886), accepted as proof of discriminatory intent the disproportionate effect upon a clear racial category. No soul-searching of governmental motive looking for an announcement of an evil purpose to create this de facto discrimination was undertaken or required.

The petitioner seeks to double the burden upon respondent, to show not only class-

ification based upon First Amendment exercise, but also to prove an evil motive in making the classification. As recognized by the Sixth Circuit, the Constitution is offended by the practice and result, and further probing is unnecessary. This system imposes an unacceptable classification, as with Yick Wo, supra.

The petitioner urges prosecutorial discretion as the rubric under which this Court should require direct proof of illicit motive. However, probing the psychological sources of the decision-making process is an even more dangerous intrusion into such discretion than the application of a more objective test of intent and inevitable result. Since this Court is the shield against unconstitutional results, it can control such effects without unduly impinging any executive decision-making process by applying the time-honored standard of intent. As in cases of criminal intent, motive need not control when deliberation and unacceptable result coincide. Inevitable results

may "ripen into proof" of discriminatory purpose. Personnel Administrator v. Feeney, 442 U.S. 256, 279 fn. 25 (1979). The petitioner concedes that its discretion must be limited by constitutional bounds. Cf. Cohen v. California, 403 U.S. 15(1971) (recognizing the context of a prosecution supports an inference of content-based distinction). Adherence to a policy with knowledge of its predictable effects, much less one with inevitable predicted effects. may prove the ultimate fact of forbidden purpose in equal protection cases. Columbus Board of Education v. Penick, 443 U.S. 449, 465 (1979).

B. "Invidious" purpose, if required, can be proven by indirect evidence. United States v. Falk, 479 F.2d 618, 624 (7th Cir. 1973) (en banc), noted that prosecuting only those who failed to acquiesce in government demands to compromise their previously communicated principles was indicative of legally improper motive. The facts herein do not differ. There is no basis for refusing to apply evidentiary prin-

ciples of inferences drawn from conduct and/or results. Direct evidence is not alone synonymous with proof, as this Court has also recognized in equal protection cases.

C. The Sixth Circuit uses "vocal" to describe one who expresses his ideas. Expressing disagreement directly to the government - petitioning for redress - surely is entitled to protection along with public speech. The Sixth Circuit recognized the scope of the First Amendment, which petitioner still fails to perceive.

D. Petitioner finds itself in a quagmire with the deterrent implications of the "passive" prosecutions. First petitioner argues that respondent's acts did nothing to discourage others from registering (Petition p. 15), but then claims that delaying the passive late July indictments when the active system allegedly went into operation in June would discourage registration. (Petition p. 7, 8, 9) It is logically insupportable then not to wait for implementation of

the active system, since the passive indictees did not threaten registration per se, unless registration was deemed to be encouraged by prosecutions of principled dissenters. To encourage registration, the passive prosecutions would necessarily chill, if not stifle, dissent.

E. The government herein claims a lack of guidance from the court of appeals upon the procedural issues of entitlement to hearing and requisite proofs to sustain or defeat the selective prosecution claim (Petition pp. 10-11, 16). However, the government evinced no such difficulty in Wayte, asserting that the standard established by the Sixth Circuit "essentially forecloses the possibility that the district court will rule for the government after an evidentiary hearing." (Wayte v. United States, Brief in Response to Petition for Certiorari, No. 83-1292 p. 15 fn. 10).

The government asserts the Sixth Circuit "said little about the requisite threshold

showing." (Petition p. 16). The Court stated:

> A defendant is entitled to an evidentiary hearing if he makes a preliminary showing that there is a legitimate issue concerning the government's conduct under this (United States v. Hazel, 696 F.2d 473, 474 (6th Cir. 1983)) standard;

A legitimate issue is raised by showing a policy resulting in prosecutions only of those who express their conscientious refusal. (Pet. App. A p. 3a). The government further complains there was "no guidance" about the evidence respondent could not discover and adduce or the government present. (Petition p. 16). The Court said evidence that the policy targeted "only young men who made confessions through their criticisms . . . " would be important (Pet. App. A. p. 7A) but also noted the government had the burden to produce non-discriminatory evidence and respondent could reply on punishment and chilling effect grounds. (Pet. App. A. p. 9a).

Finally, the government misstates the

holding of the Sixth Circuit as "the government may not prosecute those who criticize government policy while confessing their failure to register." (Petition p. 16), apparently to avoid the real issue presented by their policy. The Court repeatedly emphasized that the government could not prosecute only those who critize government policy. (Pet. App. A. pp. 2a, 3a, 4a, 5a, 6a, 7a).

F. The Sixth Circuit has provided the proper framework of analysis, and reached the correct result herein. First Amendment rights are necessarily burdened by the system and policy single-mindedly pursued by petitioner despite obvious drawbacks in its content-based, discriminatory selectivity. The expected creation of a recognized class of persons who spoke out either to the government or publicly as the only ones even possibly identified by such system is a violation of the Fifth Amendment as well, for classification is based upon the exercise of constitutional rights. The allegations, backed by proofs including govern-

mental documents, entitle respondent to an evidentiary hearing.

CONCLUSION

This Court should either deny certiorari and remand respondent for hearing pursuant to the law and standards set forth in the court of appeals' opinion and judgment below; or, if jurisdiction is to be exercised, consolidate this cause on the merits with Wayte v. United States, No. 83-1292 (cert. granted May 29, 1984).

Respectfully submitted,

ELIZABETH REILLY
WILLIAM T. WHITAKER
JOHN LAWSON
DALE A. BAICH

Dated: August 14, 1984

August 10, 1980

To whom it may concern:

I am writing to inform you that I have violated the Military Selectice Service Act by not registering. I feel that I must refuse to comply with this law because registering would force me to compromise my Christian faith.

I believe that war in any form is wrong. Christ meant for Christians to love each other and to love their enemies. War is an expression of hatred and an institution that has legalized and encouraged types of violent conduct that no civilized country would allow within its borders during peacetime. The use of force to resolve disputes has created an atmosphere of coercion which directly conflicts with the message of love preached by Christ. A Christian must use truth, love, understanding, and equality to resolve any disputes in which he is involved. As a Christian,

I feel that I must avoid participation in the conscription process by not registering because conscription is an inherent part of the war process.

At this point, I feel that I should emphasize that I am not anti-American. I consider myself privileged to live in a country where basic human rights, self-government, and religious freedom are granted to the citizens. I am not opposed to serving this great land of ours by working in a hospital, teaching, or by working at some other type of public service job. However, I can not participate, in any manner, with the armed forces.

Sincerely,

Mark Schmucker